

## France Takes Next Step in Anti-Corruption Enforcement: First "French DPAs" and What Companies Should Know

### IN SHORT

**The Situation:** Anticorruption legislation passed by French lawmakers in 2016 authorizes the resolution of a corruption matter by means of a "*convention judiciaire d'intérêt public*" ("CJIP"), the French version of a deferred prosecution agreement ("DPA"). Three "French DPAs" have been entered into thus far.

**The Result:** These first-of-their-kind resolutions offer a good opportunity to highlight the main features of the French version of the DPA and to draw comparisons with resolutions in other countries.

**Looking Ahead:** The increased flexibility that French prosecutors have to settle cases by means of a CJIP has significant implications with respect to the efforts of French authorities to investigate and prosecute allegations of international corruption.

In response to growing criticism directed at the country's anticorruption legal framework, French lawmakers passed Law No. 2016-1691 on transparency, anticorruption, and modernization of the economy in December 2016. This law, commonly referred to as the "Sapin II Law," introduced a new feature authorizing the resolution of a corporate corruption case through a CJIP.

In a CJIP resolution, the French public prosecutor and the company involved agree to the deferral of a criminal prosecution, subject to the company's satisfaction of certain conditions. In this way, the company can avoid a criminal conviction by paying a fine (which amount is capped at 30 percent of the company's average annual turnover over the past three years) and/or by being subject to a compliance/remediation program under the control of the French Anticorruption Agency. In addition, the company may be compelled to compensate victims for any damages they sustained as a result of the conduct at issue. CJIPs are applicable only to companies and only in cases involving corruption, influence peddling, laundering tax fraud proceeds, and related offenses.

Since the enactment of the Sapin II Law, the French public prosecutor has made use of this alternative to prosecution on three occasions. While the first CJIP was the subject of much commentary, the two more recent CJIPs were entered into with the utmost secrecy.

The first-ever CJIP was entered into between a Swiss private bank and the French financial prosecutor's department on October 30, 2017, and was validated by the president of the Paris High Court on November 14, 2017. This resolution arose out of allegations that the bank engaged in aggravated money laundering of the proceeds of tax fraud. In connection with the CJIP, the bank acknowledged the facts set forth in the CJIP and agreed to pay a sum of €300 million, including damages, disgorgement of profits, and a penalty tied to the legal violation. The bank was not subjected to a compliance/remediation program.

The most recent CJIPs were entered into by two French companies on February 14 and 15, 2018, and both cases involved corruption of a public official. In one of these cases, the CEO of the targeted company paid illegitimate commissions, amounting to more than €130,000, to an employee of a public business partner in exchange for obtaining and maintaining public contracts. This same public employee was also involved in the other case, in which this employee was paid hundreds of thousands of euros in cash by employees of the targeted company in exchange for obtaining and maintaining public contracts. In their CJIPs, the two companies acknowledged the facts and agreed to pay penalties of €800,000 and €2.7 million, respectively. In addition, the companies agreed to compensate the victims for their damages and undertake remediation measures.

These cases offer insight into considerations relevant to determining whether a CJIP may be an appropriate resolution in particular cases and, if so, what the CJIP may entail by way of conditions and requirements for the company involved. The CJIPs already entered into demonstrate that the public prosecutor takes into account several factors when setting the amount of the "public interest fine." The



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level of the company's cooperation and steps taken to prevent, detect, and remediate corruption are deemed to be mitigating factors (e.g., dismissal of the employees involved in violations, changes in top management, implementation of internal ethics, and compliance standards). On the other hand, certain aspects of an offense are deemed to be aggravating factors (e.g., duration of offense, involvement of public officials).

The special attention given to companies' level of cooperation is not specific to French CJIPs. Indeed, in the United States, it is well established that cooperation is a mitigating factor by which corporations and individuals can gain credit and leniency. Similarly, the initial DPAs in the United Kingdom, as well as policy pronouncements of the U.K. Serious Fraud Office, also emphasize the importance and mitigating effect of early self-reporting and cooperation on the part of the defendant.

As the early CJIPs indicate, the French enforcement authorities are effectively starting to use the enforcement tools introduced by the Sapin II Law. Whether or not, under the *ne bis in idem* doctrine, a CJIP would bar another country from prosecuting the company involved for the same conduct remains an important question, one that will no doubt be elucidated by additional legal developments, such as the recent decisions touching on *ne bis in idem* issued by the French Supreme Court and the European Court of Human Rights.

## TWO KEY TAKEAWAYS

1. The Sapin II Law introduced the French version of a U.S. DPA in corruption-related matters, referred to as a "*convention judiciaire d'intérêt public*."
2. "French DPAs" allow companies to avoid a criminal conviction by paying a fine and/or implementing a compliance program.

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